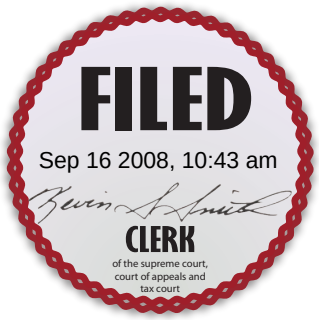

ATTORNEY FOR APPELLANT:

STEVEN J. BRUCE
Muncie, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

MICHAEL LEIGH STEPHENS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0803-CR-263
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John M. Feick, Judge
Cause No. 18C04-0706-FA-4

September 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Michael Leigh Stephens appeals his conviction, after a trial by jury, of attempted murder, a class A felony,[1] and the restitution provision of his sentencing order.

We affirm the conviction but remand for proceedings to determine proper restitution.

ISSUES

1. Whether the trial court erred in admitting into evidence a digital recording of Stephens' interview by the police because it included statements by the officers that questioned Stephens' asserted lack of memory.

2. Whether in its closing arguments to the jury, the State committed prosecutorial misconduct that constituted fundamental error.

3. Whether the trial court erred in instructing the jury as to the requisite intent to convict on the offense of attempted murder.

4. Whether the trial court erred in its order for restitution.

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[1] The jury returned verdicts finding Stephens guilty of two offenses: attempted murder, a class A felony, and aggravated battery, a class B felony. At sentencing, however, the trial court entered judgment of conviction against Stephens only as to attempted murder, a class A felony, finding that the aggravated battery offense "should be merged" therewith. (App. 311).

FACTS[2]

On June 1, 2007, Shawna Stinson and Stephens shared a home, along with their two-year-old daughter and five-month-old son. Stinson was a hair stylist, and she worked that day from 2 to 6 p.m. Before she left for work, she and Stephens had argued. Stephens, who was unemployed, stayed at the home to care for their children. At approximately 6:30 p.m., Stinson returned home and found Stephens watching television and drinking a 24-ounce can of beer. Stinson scolded Stephens for "drinking when he was supposed to be caring for [their] children." (Tr. 90).

Stephens yelled at Stinson and continued to drink, consuming at least two more of the beers. They argued, and Stephens "called her a bitch." (Tr. 91). Stephens then pushed her, and "told [her] he was going to kill [her] . . . because he was sick of [her] bitching." (Tr. 93). Stinson called Susan Stephens ("Mrs. Stephens"), Stephens' mother, who lived nearby, and "told her that she needed to come over" to help calm down Stephens. (Tr. 94). Mrs. Stephens heard the urgency in Stinson's voice and arrived within minutes.

Stephens tried to prevent his mother's entry, but Stinson let her in. Stephens was "acting . . . out of control," and continued to yell at Stinson. (Tr. 95). Stinson told

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[2] The Statement of Facts presented by Stephens begins with reference to his police interview and subsequent objection to admission of that recorded interview, then proceeds with references to statements in the State's closing arguments, the trial court's instructions concerning the requisite intent and his objections thereon, and its restitution order. We recognize that Indiana Appellate Rule 46(A)(6) provides that the Statement of Facts "shall describe the facts relevant to the issues presented for review." However, such facts must also necessarily include those giving rise to the reason the appellant is seeking review. Here, Stephens was convicted and sentenced for attempted murder after an incident in which he repeatedly stabbed his girlfriend. Therefore, his appellate brief should have provided us with the facts presented at trial concerning that stabbing, the facts that led to the conviction giving rise to his appeal.

Stephens "that he needed to leave because [she] didn't want to fight." (Tr. 96). Stephens "said he wasn't going to leave, so [Stinson] called [her] father" and told him she and the children were coming to his house. *Id.* Stephens "told [her she] wasn't leaving, and he pushed [her] onto the couch." (Tr. 97).

Stephens "was standing above [her]," and bent "really close to [her] face,"; he "told [her] he was going to kill [her] and then he pulled a knife out of his pocket." *Id.* "He opened the blade," and Mrs. Stephens "said, you need to put that up." (Tr. 99). Stinson grabbed a pillow and put it in front of her; Stephens stuck the knife in the pillow and flipped it aside. Stinson "grabbed the other pillow," and "he did the same thing with that one." (Tr. 100). Stinson then grabbed one of Stephens' arms and "told his mom to grab his other arm." *Id.* When Stephens turned toward his mother, Stinson managed to get away and "run out the front door." *Id.*

When she was "one step out the front door," Stinson felt "a burning pain" in her upper left back and "blood dripping"; Stephens "stabbed [her] repeatedly in the back," a total of six times. (Tr. 101, 102). Stinson "dropped down to the ground"; Stephens "came around to the front of [her]"; she "put [her] leg up and [her] hand to block him"; and "he stabbed" the back of her leg and her finger. (Tr. 102). Standing over her, Stephens "said, I told you not to f*** with me, bitch, and then he took off running." (Tr. 103).

Stinson lay on the porch, feeling "the worst pain [she had] ever had in [her] life," a sensation "like [she] had a crushing weight on [her] chest and [her] back." (Tr. 108). Stinson "made [her]self get up," and went inside, where Mrs. Stephens was talking to the

9-1-1 operator. *Id.* Stinson "felt like [she] was going to pass out" and was in "excruciating pain." (Tr. 110, 111). Because she "didn't want to get blood all over the house and . . . didn't want her children to see [her] like that," Stinson propped herself against the wall to hide her bleeding while she waited by the front door for the ambulance. (Tr. 110). Her two-year-old daughter came to her, and Stinson "was afraid [she]'d never see her again" because she "thought [she] was going to die." *Id.*

An ambulance transported Stinson to Ball Memorial Hospital, where she was treated for a collapsed lung, puncture wounds to her back, and the laceration to her leg. She was then transported to a hospital in Indianapolis because the wound to her finger was so "deep" that "there was exposed tendon and lacerated neurovascular structure," requiring repair by a hand surgeon. (Tr. 248).

After stabbing Stinson, Stephens fled on his motor scooter, going to the Red Dog Tavern in Muncie to talk to a friend. There, he drank more beer -- "to calm [his] nerves," he later explained, (Tr. 408), and then spent the night on a local trail. The next day, Stephens went to his mother's house, and she drove him to City Hall; he turned himself in to law enforcement officers.

After being arrested, Stephens was advised of his *Miranda* rights, and he signed a waiver thereof. Detective Barry Privett and Officer Amy Fisher interviewed him. He stated that he did not "remember too much of what happened." (Ex. 18). He did remember that he and Stinson had been "arguing," and that he "was drinking," consuming 4-5 beers; however, he stated he did not "remember" the stabbing because he "kind of blacked out" during that time. *Id.* Stephens stated that when he had left his

home the night before, he went to the bar to talk to his friend, and he also described where he had gone after he left the bar. During the interview, the officers expressed skepticism about Stephens' claim that he did not remember stabbing Stinson.

On June 5, 2007, the State charged Stephens with attempted murder, a class A felony, and aggravated battery, a class B felony. He was tried before a jury on January 28 – 30, 2008.

During opening statement, Stephens' counsel advised the jury that Stephens admitted stabbing Stinson but asserted that he "did not try to murder" or "try to kill" her. (Tr. 78). Counsel then noted that Stinson had left Stephens alone for more than five hours to care for their children, that the five-month-old was "always fussy" and "throwing up"; that when Stinson arrived home, she "lit in to him"; that as they argued, Stephens' "coping mechanism" was to keep drinking; and that after the "escalating argument, something terrible happened." (Tr. 78, 79, 80). The evidence, counsel argued, would show that Stephens "didn't set out to kill [Stinson]," that he was "not guilty" because he "did not intend to murder her." (Tr. 80). Therefore, the jury should conclude "that he did not intend to kill her." *Id.*

Stinson testified as reflected above. A physician testified that her lung injury created a substantial risk for death. The digital recording of Stephens' interview with the police was played for the jury, despite Stephens' objection to the officers' skepticism concerning his lack of memory. Stephens testified that as soon as Stinson walked in the door, she "started yelling at [him]"; the arguing continued, "get[ting] worse and worse"; after his mother arrived, they "just kept arguing"; and when Stinson said she was leaving

it felt "like adding fuel to a fire" and "blaming [him] for everything, and trying to make it look like it was all [his] fault to [his] mom." (Tr. 385, 386, 389, 392). He described Stinson's verbal attacks as "hurting [him] emotionally" in a "pretty bad" way. (Tr. 414). Stephens acknowledged his "vague[]" memory of pulling a knife from his pocket and his mother "telling [him] . . . to put [his] knife away." (Tr. 392, 393). He testified that after he backed away and allowed Stinson to get off the couch, she "ran to the door" and began yelling "help." (Tr. 395). He testified that "at that point, [he] snapped" and "stabbed her," but he did not remember the details of the stabbing, and he was not "trying to murder" her but "just got carried away." (Tr. 396).

During testimony by both Stinson and Stephens, defense counsel elicited evidence which revealed that caring for the five-month-old child had been difficult. Testimony was presented that Stephens had previously been prescribed medication for anxiety.

In closing argument, defense counsel enumerated "components" that led to the stabbing (Tr. 452): Stephens' anxiety disorder; the fussiness of the five-month-old child left in his care; his unemployment; that he also was left to care for a two-year-old child; the ongoing strains of a family relationship; that there had been an argument earlier in the day; that he had just reached a point of personal relaxation and started to drink a beer when Stinson returned home; that she launched a verbal attack on him as she walked in the door; that their mutual argument had also inflicted "hurt" on him; and that the argument had escalated, with Stephens "coping" by drinking multiple beers and Stinson "running out." (Tr. 459, 457). Counsel urged the jury to consider "what was happening,

leading up to" the stabbing. *Id.* Counsel argued that Stephens "did not intend to kill" Stinson but "just lost it, and that's what happened." (Tr. 458).

In its closing argument, the State asserted that the jury should not allow the defense to distract their focus to actions of the victim or the police. It argued that the jury should not allow Stephens to "slip away again" and escape his guilt as he "was able to escape in the night" on June 1, 2007. (Tr. 451). Finally, the State argued that many people, perhaps the jurors themselves, had experienced many of the "components" that Stephens urged them to consider as having led up to his stabbing of Stinson.

At the sentencing hearing, the trial court noted that Stinson's written statement referenced "some medical bills that are outstanding" and found that Stephens "ought to do restitution on those." (Tr. 524, 525). The trial court's sentencing order includes an order of "restitution to the victim . . . for outstanding medical bills," and directs that "restitution shall be determined by the probation officer and provided to the court." (App. 312).

DECISION

1. Admission of Recorded Interview

The trial court has inherent discretionary power on the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004). Its decision to admit evidence is reviewed only for an abuse of discretion. *Id.*

Stephens argues that the trial court abused its discretion when it allowed the jury to view those portions of his recorded interview wherein the officers expressed their skepticism about his asserted lack of memory concerning the stabbing of Stinson.

Specifically, he argues that the officers' statements were inadmissible pursuant to Indiana Rule of Evidence 704(b) and *Smith v. State*, 721 N.E.2d 213 (Ind. 1999). We disagree.

In *Smith*, the admitted police interview included the officer's statement, "I thought it was you." 721 N.E.2d at 217. Our Supreme Court cited Evidence Rule 704(b), prohibiting witness testimony "'to opinions concerning intent, guilt, or innocence in a criminal case . . . .'" *Id.* It held that the "same reasoning underlying rule 704(b)'s prohibition of opinions of guilt during live in-court testimony applies to statements offered at trial that were made at another time and place." *Id.* The statements made by the officers interviewing Stephens, however, did not express an opinion of his guilt.

Smith also noted challenged statements by the officer that referenced statements by others indicating Smith's guilt. *Id.* at 216. Our Supreme Court noted that there had been no request for either a limiting instruction or an admonishment that the officer's "statements were not to be used for the truth of the matters asserted." *Id.* It concluded that "the lack of an admonishment in this case combined with the fact that the statements appear to be assertions of fact by the detective, not mere questions, renders their admission error." *Id.* Hence, *Smith* suggests that the lack of a limiting instruction was critical to its conclusion of trial court error.

Here, the trial court preliminarily denied Stephens' objections to admission of the recorded interview with the officers' statements, but offered to provide a limiting instruction with the final instructions, and Stephens agreed. In its final instructions, the trial court advised the jury as follows:

> . . . what the police officers say in the course of an interview is not evidence and not to be considered by you as evidence. Certain things that the police officers say, and representations that they make during the interview, may or may not be true. These statements should be considered only as part of the questioning of the defendant for the purpose of eliciting or drawing out information from the defendant.

(Tr. 489).

Further, *Smith* discussed *Strong v. State*, 538 N.E.2d 924 (Ind. 1989), in which our Supreme Court had affirmed when an officer's interview "questions and comments" were found "to elicit responses from the defendant and . . . 'not offered as proof of the facts asserted therein.'" *Id.* (internal citation omitted). *Smith*, 721 N.E.2d at 216 (quoting *Strong*, 538 N.E.2d at 928). In *Strong*, the interviewing officer had stated, "'I want to caution you on one thing. Physical evidence proof, stuff that Lt. Loy saw and found at your house on that night . . . [d]oesn't match stuff that you tell us.'" *Id.* *Smith* also discussed another admission which was challenged on appeal by Smith regarding the interviewing officer's questioning of Smith as follows:

> Q. Well, you know, if we . . . anybody we brought in here who would say in your gut who do you think might have done this . . .
> [Smith]: Um-Hum. They would probably said me.
> Q. Omond. How does it feel to be, have that kind of reputation? Everybody wants you.
> [Smith]: Everybody! That's messing me up.

Id. Our Supreme Court found that as in *Strong*, these statements by the officer were admissible as "statements designed to elicit a response . . . ." *Id.*

The statements by the interviewing officers did not express an opinion of Stephens' guilt; the trial court gave a limiting instruction; and the officers' statements of skepticism could support the reasonable inference that they were designed to elicit a

response from Stephens. Therefore, we find that the trial court did not abuse its discretion when it admitted the recorded interview.

2. Prosecutorial Misconduct

Stephens argues that comments in both the State's closing and rebuttal arguments constitute prosecutorial misconduct which rises to the level of fundamental error. We disagree.

On appellate review of a properly preserved claim of prosecutorial misconduct, "we determine (1) whether the prosecutor engaged in misconduct, and if so, (2) whether the misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she would not have been subjected." *Cooper v. State*, 854 N.E.2d 831, 835 (Ind. 2006). Initially, Stephens concedes that he did not seek a mistrial or seek an admonishment with respect to any of the comments he now finds impermissible. This failure results in waiver. *Id.*

Where a claim of prosecutorial misconduct has not been properly preserved, the defendant "must establish not only the grounds for the misconduct but also the additional grounds for fundamental error." *Id.* Fundamental error is an extremely narrow exception. *Id.* "It is error that makes 'a fair trial impossible or constitute[s] clearly blatant violations of basic and elementary principles of due process . . . present[ing] an undeniable and substantial potential for harm.'" *Id.* (internal citation omitted).

Stephens asks us to review a series of comments made by the prosecutor in closing argument. He cites to comments which (1) urge the jury not to be distracted by Stephens' claims about Stinson's behavior; (2) assert that the jury should not allow Stephens to

"slip away again" as he did the evening of June 1st; and (3) respond to Stephens' claim that his actions resulted from his anger, anxiety problem, caring for a fussy child for hours while waiting for relief, strained relationship with Stinson, excessive drinking, and the heated argument. (Tr. 451; Stephens' Br. at 19).

Prosecutors are entitled to comment on the evidence and to respond to allegations and inferences raised by the defense even if the prosecutor's response would otherwise be objectionable. *Cooper*, 854 N.E.2d at 836. Stephens' testimony, his counsel's examination of witnesses at trial, and his counsel's closing argument all directed considerable attention to Stinson's behavior. Several of the comments that he argues constitute prosecutorial misconduct were in response to the allegations and inferences raised by the defense.

Moreover, remarks that "were fair commentary on the facts introduced at trial" will not be held to be improper prosecutorial conduct. *Id.* at 837. By Stephens' own admission, he did not stay at the home after stabbing Stinson. Therefore, the comment that he had "slip[ped] away" was a fair commentary. (Tr. 451).

Stephens proceeds to direct our attention to multiple additional instances of what he argues to be prosecutorial misconduct. We have addressed his first three examples, assuming them to be his strongest, and we find none constitute prosecutorial misconduct. We also note that the trial court expressly instructed the jury that "[s]tatements made by the attorneys are not evidence." (Tr. 489). Stephens must not only establish misconduct but also fundamental error. We find no prosecutorial misconduct that made a fair trial impossible, or clearly blatant violations of the basic and elementary principles of due

process that presented undeniable and substantial harm to Stephens. *Cooper*, 854 N.E.2d at 835.

3. Instruction

Stephens acknowledges that the trial court "properly instructed" (Stephens' Br. at 26) the jury as follows in Instruction 4:

> The crime of attempted murder is defined as follows: A person attempts to commit a murder when, acting with the specific intent to kill another person, he engages in conduct that constitutes a substantial step toward killing that person. Before you may convict the Defendant of attempted murder, the State must have proved each of the following elements beyond a reasonable doubt:
> 1. The Defendant, Michael Leigh Stephens,
> 2. acting with the specific intent to kill Shawna M. Stinson,
> 3. did stab Shawna M. Stinson,
> 4. which was conduct constituting a substantial step toward the commission of the intended crime of killing Shawna M. Stinson.
>
> If the State failed to prove each of the elements beyond a reasonable doubt, you should find the Defendant not guilty of the crime of attempted murder, a class A felony, as charged in Count 1.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the Defendant guilty of attempted murder, a class A felony, as charged in Count 1.

(Tr. 484-485).

However, he contends that the trial court erred when it subsequently instructed the jury in Instruction 7 that

> intentionally is defined by statute as follows: a person engages in conduct intentionally if, when he engages in the conduct, it is his conscious objective to do so.

(Tr. 486). Stephens argues that the trial court should have instead given his proffered instruction, which provided:

> A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective not only to engage in the conduct, but also to cause the result.

(App. 188). According to Stephens, *Spradlin v. State*, 569 N.E.2d 948 (Ind. 1991) requires the giving of his tendered instruction because it informs the jury that the State must prove the defendant's "specific intent to actually kill, not just engage in" the stabbing. Stephens' Br. at 27. Therefore, he argues, his attempted murder conviction must be reversed. We cannot agree.

Instructing the jury is a matter assigned to trial court discretion. *Ham v. State*, 826 N.E.2d 640, 641 (Ind. 2005). The trial court abuses that discretion when the instructions as a whole mislead the jury as to the law in the case. *Id.*

We first note the general manner in which the instructions were given to the jury. In Instruction 3, the trial court provided the allegations presented in the charging information, which alleged that Stephens had committed attempted murder ("did . . . engage in conduct that constituted a substantial step toward the commission of the intended killing of Shawna Stinson, . . . Stephens stabbed Shawna Stinson") and aggravated battery ("did knowingly inflict injury on . . . Stinson that created a substantial risk of death"). (Tr. 483, 484). The trial court then gave Instruction 4, which defined the crime of attempted murder and specified what the State was required to prove beyond a reasonable doubt in order for the jury to find him guilty of that crime. Next, the trial court gave Instruction 5, a detailed instruction concerning the crime of aggravated battery, as a class B felony. As explained in Instruction 5, the definition of aggravated battery provides that the defendant's infliction of injury must be done "knowingly or

intentionally"; however, here – consistent with the charging information, the jury was informed that the State was required to prove that Stephens "knowingly" inflicted the injury. (Tr. 485). Immediately following, the trial court instructed the jury as to the statutory definition of "knowingly" in Instruction 6, and "intentionally" in Instruction 7. It is the latter, Instruction 7, which Stephens now argues constitutes reversible error despite the correct and admittedly proper Instruction 4.

Instruction 7 precisely quotes Indiana Code section 35-41-2-2(a): "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." Further, Instruction 7 tracks the jury instructions as to Count 2, alleging that Stephens committed the crime of aggravated battery. The jury had already been instructed on the law concerning Count 1, attempted murder, by Instruction 4.

Spradlin held that

> an instruction which purports to set forth the elements which must be proven in order to convict of the crime of attempted murder must inform the jury that the State must prove beyond a reasonable doubt that the defendant, with intent to kill the victim, engaged in conduct which was a substantial step toward such killing.

569 N.E.2d at 950. Instruction 4 so instructed the jury, satisfying *Spradlin*.

We do not find that the trial court abused its discretion when subsequent to correctly providing to the jury Instruction 4, and three instructions later -- in the context of its overall instructions regarding the charged crime of aggravated battery, it provided the statutory definition of "intentionally."

4. Restitution Order

Stephens argues that the trial court erred when it ordered that he pay restitution for Stinson's "outstanding medical bills" in an amount to "be determined by the probation officer." (App. 312). We must agree.

An order of restitution is a matter within the trial court's discretion, and we review for an abuse of that discretion. *Bennett v. State*, 862 N.E.2d 1281, 1287 (Ind. Ct. App. 2007). An abuse of discretion occurs if the court's decision is clearly against the logic and effects of the circumstances before it, or when the trial court misinterprets or misapplies the law. *Id.*

Indiana law authorizes the trial court to order a person convicted of a felony to make restitution to the victim as part of his sentence. *See* Ind. Code § 35-50-5-3(a). However, the trial court's restitution order "shall" be "base[d] upon," *inter alia*, "medical and hospital costs incurred by the victim . . . as a result of the crime." *Id.* In this regard, we have held that the trial court must consider the "actual costs incurred by the victim." *Kellett v. State*, 716 N.E.2d 975, 980 (Ind. Ct. App. 1999). Further, the "amount" of those costs for the victim's medical expenses "is a factual matter," requiring "the presentation of evidence." *Id.* Here, there was no evidence of Stinson's medical expenses presented to the trial court. Hence, the trial court abused its discretion by ordering restitution without following the statutory procedure.

Stephens asks that we "remand[] for proper proceedings on restitution," and the State agrees that the appropriate remedy is to "remand . . . for a hearing at which a correct order may be entered." Stephens' Br. at 29; State's Br. at 19. We so order.

Conviction affirmed, and restitution order remanded for further proceedings.

FRIEDLANDER, J., and BARNES, J., concur.